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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, *Petitioner*,

v.

NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY and LOS ANGELES RAMS FOOTBALL CLUB

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INTRODUCTION

Petitioner has framed two questions for the consideration of this Honorable Court. Neither serves the purpose of Rule 40-1(d) in that neither delineates the issues. The first couched in the terms of "exemption" is meaningless.

No contention is made that the National Football League is exempt from the application of the Sherman Antitrust Act. The second is too broad. Petitioner fails to focus attention upon the allegations of his own complaint, the dismissal of which constitutes the basis for discussion.

Consequently it is appropriate to present for determination not the questions presented by the petitioner, but rather the following:

QUESTIONS PRESENTED

A. Lack of Jurisdiction of the Subject Matter

Whether certain reasonable restraints on players exercised by professional football to promote athletic competition are not in violation of the antitrust laws by reason of decisions of the Supreme Court of the United States that identical aspects found in the structure of organized baseball were not intended by Congress to be embraced within the scope of the antitrust laws.

B. Failure to State a Claim Upon Which Relief Can Be Granted

1) Whether plaintiff's Complaint failed to state a claim upon which relief can be granted in that

(a) it failed to allege any causal connection between any alleged injury to plaintiff and anything forbidden in the antitrust laws, and

(b) it failed to allege that any act of respondents by which plaintiff might have been injured was calculated to prejudice, or did prejudice the public or unreasonably restrain interstate commerce.

2) Whether plaintiff's Complaint constitutes a labor claim specifically exempted from the antitrust laws by the Clayton and Norris-LaGuardia Acts.

COUNTER-STATEMENT OF THE CASE

The plaintiff while under contract to render services as a professional football player to the Detroit Lions, a member of the National Football League, in disregard of the obligation of such contract, agreed to render and did render like services to the Los Angeles Dons, a member team of a rival league, the All-America Conference. The compensation agreed to be paid plaintiff by the Los Angeles Dons was double that prescribed in the contract of the Detroit Lions (R. 11, 12).

By reason of the violation of the contract of a member team, the National Football League placed the name of plaintiff upon a suspension list for a period of five years, in accordance with an established disciplinary procedure. (R. 14, 15)

Plaintiff played with the Los Angeles Dons during the 1946 and 1947 seasons (R. 14). It is alleged that in 1948 plaintiff received an offer to serve the San Francisco Clippers of the Pacific Coast League, as a player and coach for an annual salary of $5000. (R. 14, 15). It is further alleged that by reason of the suspension of plaintiff by the National Football League and the existence of a relationship between such league and the Pacific Coast League, the offer was withdrawn. (R. 15).

The foregoing are the ultimate facts. Allegations designed to afford a basis for jurisdiction under the Sherman and Clayton Acts are added. Interstate activity is alleged in the travel of teams from state to state in order to stage exhibitions at various league cities and in contracts entered into with broadcasting and televising companies for the right to carry narratives and pictures of the exhibitions (R. 7, 8).

The monopoly or conspiracy are alleged by recital of the following:

(a) An agreement that all teams of the National Football League shall use a uniform players contract.

(b) An agreement to insert in said uniform players' contract a "reserve clause" binding the player to the club with whom he has contracted.

(c) An agreement to black-list a player who violates the "reserve clause". (R. 10)

These are the facts material to this discussion. Petitioner has protested that the decision below has "distilled" his complaint. We recognize his right to have the complaint considered from its four corners. However, the complaint is based upon the "reserve clause" feature in the organization of professional baseball and football. Thus, the "reserve clause" is the gravamen of the action.

SUMMARY OF THE ARGUMENT

A. LACK OF JURISDICTION OF THE SUBJECT MATTER

(1) Stare Decisis

The Supreme Court of the United States in decisions relative to organized baseball (*Federal Baseball, Toolson, Corbett and Kowalski, infra*) ruled that certain aspects of the operation of the business of baseball were not violative of the antitrust laws. These decisions did not "exempt" baseball from the impact of the antitrust laws. They stand as a determination that certain aspects in the organization of baseball, designed to promote athletic competition, were not intended by Congress to be included within the scope of the antitrust laws. The sport of professional football has adopted the same aspects of baseball which received judicial approbation and in reliance upon such approbation has developed an organizational pattern identical with that of baseball. These parallel aspects of football have been offered for judicial scrutiny by the complaint before us. The Court below having determined that the operation of football "has just about the same aspects as base-

ball" was correct in sustaining the dismissal upon the holding in the baseball cases. *Stare decisis* compels such result.

(2) Radio and Television

The transmission of reports of football games by radio and television does not constitute a basis for distinguishing the case at bar from *Federal Baseball.* Interstate transmission of reports was also present in the original baseball factual situation and no legal basis for distinction exists. A local activity is not transformed into an interstate activity by a report thereof relayed through instrumentalities of interstate commerce. The respondents themselves are not engaged in broadcasting or telecasting and the sale to others of rights to transmit a report of the local exhibition does not convert the thing reported into the same species as the reporting medium.

(3) Validity and Reasonableness of Player Restrictions

The gravamen of the complaint of petitioner is the "reserve clause" employed by football to wed a player to a particular team. The same clause constituted the substance of the grievance in each of the baseball cases. Its validity and reasonableness have been passed by both Court and Congress as part of the baseball pattern. No reason in law or logic exists why the same determination should not result when the same clause is presented as part of the football pattern.

Even should it be resolved that for some reason the baseball decisions are peculiar to the business of baseball and not applicable to other similar facts, the clause, as part of the football structure is reasonable. Though football be interstate commerce and subject to the antitrust laws in all of its aspects, yet restraints upon interstate commerce are objectionable only when unreasonable. All of the reasons advanced by the Courts and Congress in upholding Baseball's "reserve clause" apply with equal

force to that of football. The position of football is even more cogent and its application of the clause less questionable than the employment of the like clause by baseball.

The Court below was correct in concluding "In professional football, very good arguments do exist for the indulgence of restraints on individual players".

(4) Boxing and Shubert Cases Distinguished

The Court of Appeals for the Ninth Circuit made a comparison of the constituents of football with those of baseball and boxing and determined that football was comparable to baseball rather than boxing. The determination is a correct one. Boxing has none of the aspects of football and the *Boxing* decision *infra,* is inapplicable. Baseball and football are team sports which have found it necessary to adopt a league organization in order to provide team competition. Spectator interest can only be maintained by balanced teams and such balance is preserved by player control in the form of contracts, reserve clauses and sanctions. None of these elements is present in the boxing format, nor does cause exist for their use in the staging of boxing exhibitions.

The Court of Appeals was likewise correct in not applying the decision of the Supreme Court in the matter of *U. S.* v. *Shubert, infra.* There is no similarity between the issues there and here raised. The *Shubert* decision is controlled by the *Hart* case, *infra,* and not by the *Baseball* cases.

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(1) Causal Connection

Section 4 of the Clayton Act affords a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust

laws." The complaint in the case at bar alleges no causal connection between any alleged injury and "anything forbidden in the antitrust laws."

(a) Deficiency of Complaint

It is true that the complaint has alleged that certain of the activities of the defendants are related to the use of instrumentalities of interstate commerce, to wit, radio and television. It is not alleged however that respondents have attempted to monopolize radio or television nor that what was done in telecasting the games has any causal connection with the damage alleged. On the contrary plaintiff alleges that he has been harmed by provisions in a player's contract and by disciplinary procedures invoked against a breach of such contract, all of which features are part of the aspect of football which relates to the promotion of competition among teams in local exhibitions.

The complaint is further deficient in that its allegations indicate that plaintiff has suffered no damage whatever because of other employment; and that any refusal of respondents to grant further employment to plaintiff is justified by his previous conduct in violating his contract obligations.

(b) League Members as Quasi-Partners

The member teams of the National Football League stand in the relationship of quasi-partners and are permitted under the decisions herein cited to adopt rules for their mutual protection and direction, provided the same are not unreasonable or contrary to the public interest. The agreements relative to player control are not unreasonable and violate no principle of antitrust law protection.

(2) Public Injury

The plaintiff has failed to allege that any act of the defendants by which he was injured was reasonably cal-

culated to prejudice the public interest by unduly restricting the free flow of commerce. The purpose of the antitrust acts was to provide protection for the public from monopolies and unreasonable restraints of trade; and the individual right of action was subordinate and incidental. A complaint to state a cause of action must show not only damages sustained by the individual plaintiff, but even more importantly, a violation of the public rights which the act was intended to protect.

(3) Labor Claim

The gist of petitioner's claim is that he has been deprived of the opportunity to render services as a professional football player by an agreement among employers engaged in giving exhibitions of professional football, not to employ persons as football players except under the terms and conditions of a specified uniform players contract. The subject of the allegedly illegal agreement and of plaintiff's claim is personal service or labor. Aside from the other fatal defects in petitioner's alleged claim, it is clear that the provisions of the Clayton and Norris-LaGuardia Acts establish that the complaint fails to state a statutory claim under the antitrust acts.

ARGUMENT

A. LACK OF JURISDICTION OF THE SUBJECT MATTER

(1) Stare Decisis

It is not the contention of respondents that professional football is exempt from the antitrust laws. Nor do we understand that baseball or any other sport possesses an exemption from the Sherman and Clayton Acts. The use of the term "exemption" is inaccurate and confusing. Whatever position organized baseball occupies with respect to these laws is predicated upon judicial interpretation of the meaning and intent of the Acts. Courts have no power to grant an exemption from statutes to any person or activity. Such is the prerogative of Congress and nothing is

found in these statutes which could be construed as a specific exemption of sports in general or baseball in particular.

The decisions of the Supreme Court of the United States relative to the sport of baseball (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898; *Toolson* v. *New York Yankees, Kowalski* v. *Chandler, Corbett* v. *Chandler,* 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64) are determinations of legislative intent. They establish the position that Congress did not intend to include within the scope of the antitrust laws certain aspects of "organized baseball" which were before the court for consideration. The aspects which were considered are found in the voluminous transcript of the *Federal Baseball Case, Volume 64 Transcript of Records, United States Supreme Court,* No. 204 (1921). They are what Justice Frankfurter has referred to as "the constituents of baseball" (*United States of America* v. *International Boxing Club of New York,* 348 U.S. 236). Congress has referred to them as "the aspects of baseball which are solely related to the promotion of competition on the playing field". (*H.R. Rep. No. 2002, (Organized Baseball) 82nd Cong. 2nd Sess. p. 230*) The principal feature considered was the so-called "reserve clause".

The Baseball Cases are not decisions that organized baseball is beyond the scope of the antitrust laws in all of its aspects. Apparently Congress has understood the Federal Baseball decision to apply to only certain aspects of the sport. *(H.R. Rep. 2002, supra, p. 230).* The United States District Court for the Eastern District of Pennsylvania correctly analyzed the matter in *U.S.* v. *National Football League,* 116 F. Supp. 319, wherein Judge Grim states:

> "I am not unmindful of the decisions of the Supreme Court in Federal Baseball Club v. National League, 259 U.S. 200, and in the very recent cases, decided November 9, 1953, of Toolson v. New York Yankees, Inc.,

> Kowalski v. Chandler, and Corbett v. Chandler, ... U.S. ..... In those baseball 'reserve clause' cases the Court dismissed antitrust suits against the major professional baseball leagues on the theory that big-league baseball is a sport, local in its nature, and not interstate commerce. The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself. The only question involved in those cases was whether professional baseball itself is interstate commerce. No question of restrictions on the sale of radio and television rights was involved in those cases. The present case, on the other hand, primarily concerns restrictions imposed by the National Football League on the sale of radio and television rights. Therefore, the present case basically concerns the League's restraint of interstate commerce in the radio and television industries. It is obvious that whether professional football itself is or is not engaged in interstate commerce is immaterial in the present case and that the decisions in the baseball cases referred to do not control the present case."

From the foregoing, including the citation of *U.S.* v. *National Football League,* it should be apparent to the Court that we concede that professional football can violate the antitrust laws. *And so can baseball.* It would be incongruous that if all the various sporting interests should conspire to eliminate the Columbia Broadcasting System from the broadcasting and the telecasting of sporting events, the court should permit the conviction of the National Football League, the United States Lawn Tennis Association and others, but nevertheless grant "exemption" to organized baseball.

Respondents contend that should the aspects which were found to be outside the scope of antitrust laws in the baseball cases be found in the organics of any other sport, then that sport would be entitled to the benefit of the baseball decisions. The doctrine of *stare decisis* demands such treatment. It is the further contention of respondents that professional football in its organization presents the iden-

tical aspects which are the constituents of baseball and that it is these aspects of the activity which constitute the basis of the complaint of Radovich.

Prior to a review of the identical aspects of baseball and football it might be well to re-appraise the principle of *stare decisis*, since language appearing in *United States* v. *Shubert*, 348 U.S. 222, causes apprehension that the doctrine is not to be accorded its accepted application when the proto-type is the *Federal Baseball* case. In the *Shubert* opinion reference is made to the reaffirmance of *Federal Baseball* in the *Toolson* decision with this qualification: "In short Toolson was a narrow application of the rule of stare decisis." Preceding the foregoing quoted sentence the *Shubert* opinion recited certain circumstances which it believed had influenced the *Toolson* decision. These are set forth as follows:

> "For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause'. During this period, in reliance on the Federal Base-Ball precedent the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation."

The circumstances recited are tantamount to a demand for facts constituting an estoppel. But the doctrine of *stare decisis* is not a mere foreclosure procedure. It is not generally recognized that the application of *stare decisis* is as limited as the principle of *res adjudicata*. However if it be the opinion of this Honorable Court that *Federal Baseball* be available only to those who have relied upon the decision and the attitude of Congress may we present the circumstances attendant with the development of professional football over the past 35 years.

The complaint of Radovich attests that the National Football League was organized in 1921, the very year in which

the Supreme Court sustained the decision of the Court of Appeals of the District of Columbia in *Federal Baseball* (R. 5). The complaint here before us further informs us that professional football borrowed from baseball the pattern of league organization (R. 5), uniform contracts, a reserve clause and the sanction of blacklisting (R. 10). Those engaged in the formation of the pattern of football had as a guide not only the general court approval of the pattern employed by baseball but the more specific comparison of the two sports:

> "If a game of baseball before a concourse of people, who pay for the privilege of witnessing it is trade or commerce then the college teams who play *football* where an admission fee is charged engage in an act of trade or commerce. But the act is not trade or commerce—it is sport". (*Federal Baseball Case*, 269 F. 681)

Even the nomenclature is identical, "uniform players' contract", "reserve clause", "blacklist", "option", "draft", and "waiver".

It is inconceivable that the identical organization of the professional sports of baseball and football could have been the result of unconscious parallel action. One was fashioned upon the other and both in reliance upon *Federal Baseball*.

The Attorneys for the government who have evidenced such interest in the pending matter, have heretofore, in briefs filed by them in the *Boxing*, and *Shubert* cases prescribed a formula to determine which if any activity, comparable to baseball should be permitted the advantage of the baseball decision. The requisites are reliance upon the *Federal Baseball* decision in the construction of a pattern of operation. Government counsel should find satisfaction in a sport which was born concurrently w ch the *Federal Baseball* decision and which used the format which had there obtained judicial approval.

While professional football is content with the imposition of a reliance qualification in order to invoke the doctrine of *stare decisis*, it is constrained to point out that such is not the controlling norm. "The application of the doctrine of stare decisis is essential to the performance of a well ordered system of jurisprudence." "Where a ruling made by an able bench, after full argument by able counsel, has been followed and applied in divers cases, and has been left unmolested by the General Assembly, it should not, unless for impelling reasons, thereafter be changed by the Court." (*Cobb* v. *Georgia*, 187 Ga. 448, 200 S.E. 796)

Any attempt by a court to limit a decision to the precise facts before it can only merit the criticism of Justice Holmes in *Haddock* v. *Haddock*, 201 U.S. 562:

> "But a court, by announcing that its decision is confined to the facts before it, does not decide in advance that logic will not drive it further when new facts arise . . . I think it reasonable to ask for an articulate indication of how it is to be distinguished."

The application of the doctrine of *stare decisis* to a factual situation with all of the features of the baseball case is most cogently urged by Justice Frankfurter in the *Boxing Case (supra)*:

> "In 1922, the Court found commercialized baseball outside the scope of the Sherman Law. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898. Last Term the Court refused to re-examine 'the underlying issues' of this adjudication and adhered to it. Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64. What were the 'underlying issues'? They were the constituents of baseball in relation to the Sherman Law. By adhering to that decision, the Court refused to depart from a judgment necessarily based on these constituent elements. To my understanding, that is what is meant by 'without re-examination of the underlying issues.' The Court decided as it did in the Toolson case as an

application of the doctrine of stare decisis. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. I do not suppose that the Court would treat the national anthem differently from other songs if the nature of a song became relevant to adjudication. If stare decisis be one aspect of law, as it is, to disregard it in identic situations is mere caprice."

* * * * *

"... Since, in the light of all the circumstances, Federal Baseball was left undisturbed by Toolson, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the Federal Baseball case should be covered by it. I cannot translate even the narrowest conception of stare decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it."

The reasoning of Justice Frankfurter is unassailable when applied to the case at bar. We believe that a factual variance between the constituents of baseball and boxing would justify the refusal of the Court to apply the doctrine when considering boxing. But veritably, baseball and football differ "not one legal jot or tittle". In the words of Justice Holmes, we "think it reasonable to ask for an articulate indication of how" they "are to be distinguished."

What then are the aspects of baseball which were before the Court in *Federal Baseball* and *Toolson* and which football claims are duplicated in football organization? Be it remembered that baseball was not the beneficiary of judicial largess which "exempted" the "national pastime". As Justice Frankfurter expressed it in the *Boxing* case: "It can hardly be that this Court gave a preferred position to Baseball because it is the great American sport."

The *Federal Baseball* decision evolved from a protracted trial in the then Supreme Court of the District of Columbia. The condensed transcript of those proceedings extends through 522 pages in the files of this Court. *Vol. 64 Transcript of Records U. S. Supreme Court, No. 294* (1921).

Every facet of the organization and operation of baseball is covered. The Constitutions of the various leagues, the National Agreement, the Agreement with Western Union Telegraph Company, Uniform Players Contracts, Reserve Clauses and correspondence constitute a portion of the numerous exhibits. Testimony of experts and owners as to the manner of operation, as to the reserve clause, its origin, reason, operation and effect, as to the control and black-listing of players, as to the waiver system and as to practically every detail in the conduct of the business of baseball are to be found in the transcript.

The Supreme Court of the District of Columbia ruled as a matter of law that the pattern presented was a violation of the antitrust laws. The Court charged the jury:

> "This declaration, very long as I say, may be divided into two parts. In the first part the plaintiffs have charged the existence and operation of what has been called 'organized ball', and I shall adopt that phrase because it is perfectly understood by us all now after the evidence has gone in. That part of the declaration charges the maintenance of this system and its operation and there seemed to be no dispute among the witnesses, no substantial dispute, no conflict in the evidence, as to what the arrangement, or system is and has been, and how it has operated, under the control of the defendants.
>
> So that the question of law arose whether that did constitute an attempt to monopolize the business in question, and as an inseparable part thereof, to monopolize a part of interstate commerce. I felt obliged to hold as matter of law that it did." (*Vol. 64 Transcript*

of Records, U. S. Supreme Court No. 204 (1921) p. 495).

It is apparent what the Court had before it has been synthesized in the expression "organized baseball". The Court was considering a pattern and not an abstract idea designated "baseball."

The same basic framework and modus operandi was considered by the Court of Appeals for the District of Columbia when baseball appealed from the adverse decision of the lower court. The Court of Appeals reversed the decision (269 F. 681) in which opinion there appears, on page 687:

> "Generally speaking, every player was required to contract with his club that he would serve it for one year, and would enter into a new contract 'for the succeeding season at a salary to be determined by the parties to such contract'. The quoted part is spoken of as the 'reserve clause', and it is found, in effect, in the contracts of the minor league players as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of 'contract-jumping', he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues."

> "The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the

ranks of the latter for many of its players. If the reserve clause did not exist, the highly skilled players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute."

The language above quoted from the decision of the Court of Appeals of the District of Columbia was before the Supreme Court when writ of error issued to the lower Court. In the opinion of Mr. Justice Holmes is found *inter alia:*

> "The decision of the court of appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of plaintiff's recovery." (*Federal Baseball*, 259 U.S. 200)

It appears clear that Mr. Justice Holmes regarded the business of giving exhibitions of baseball as "purely state

affairs" and also decided that such exhibitions "would not be called trade or commerce in the commonly accepted use of those words." But it is equally clear that the whole pattern of organized baseball was patent to the Supreme Court when the *Federal Baseball* case was decided. The decision is not a summary dismissal of the subject.

The *Federal Baseball* case has been cited and applied on numerous occasions by the United States Supreme Court, by United States Courts of Appeals, by United States Districts Courts and by the Courts of the several states. Its precise import may not always have been weighed. The case was given a very broad interpretation and was regarded by many courts as a refuge for not only baseball in all of its aspects, but for all types of sporting enterprises and in all of their aspects. Most courts seemed to consider that Congress had acquiesced in a blanket exclusion for baseball if not for all sports. It would appear that it was not until the decision was questioned in the *Gardella* v. *Chandler*, 172 F. 2d 402, that analysis was undertaken to determine the precise points for which *Federal Baseball* was authority. In *Toolson* we were told that *Federal Baseball* "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws". In *United States* v. *Shubert*, 348 U.S. 222, we are advised that the baseball cases may be read as "specifically fixing the status of the baseball business under the antitrust laws *and more particularly the validity of the so-called 'reserve clause.'*"

The United States District Court for the Eastern District of Pennsylvania in *U. S.* v. *National Football League*, 116 F. Supp. 319, refers to *Federal Baseball, Toolson, Kowalski* and *Corbett*, as the "baseball 'reserve clause' cases" and observes: "The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself."

Congress likewise has given consideration to the extent of baseball's present position and in considering bills

which would afford an exemption to all professional sports in all of their aspects, rejected the suggested legislation upon the objection that the exemption embraced all other activities "as well as the aspects of baseball which are solely related to the promotion of competition on the playing field". *(H.R. Rep. 2002, 82nd Cong. 2nd Sess. p. 230).* Pregnant in such language and the report in general is the inference that Congress does approve the exclusion from the antitrust laws of the aspects which are solely related to the promotion of competition on the playing field. Properly construed *Federal Baseball* plus *Toolson* does constitute an approval of these aspects of the sport. And so refined, these decisions no longer should cause the hysteria which public officials have exhibited. The sweeping "exemption" of all sports in all of their aspects would be avoided. The approved pattern of player distribution and regulation found in baseball and followed in football would be the only aspects outside of the scope of antitrust regulations.

The conformity of the organizational and operational patterns of baseball and football are most convincingly established by the mere reading of the record in *Federal Baseball,* the complaints in *Toolson, Corbett* and *Kowalski* and comparison with the complaint of Radovich here before us. There is not one relevant fact *alleged* in the Radovich complaint which does not stand as *proved* in the *Federal Baseball* record. The organization of the sport into leagues of competing teams, the agreement to employ a uniform players' contract, the insertion in said contract of a reserve clause wedding the player to the team with which he was signed, the agreement to suspend and black-list players who violate the reserve clause are in common the pattern of each sport and are the aspects of each which have elicited the complaints which brought on judicial scrutiny.

The *Toolson, Corbett* and *Kowalski* cases confirm the identical features of the two sports. Although these cases

came to the higher Courts after dismissals below and consequently have not the voluminous record of testimony found in *Federal Baseball*, each offers a complaint setting forth the very charges which are here under consideration with respect to football. The complaints in *Toolson, Corbett* and *Kowalski* are interchangeable with that of Radovich.

We set forth for comparative analyses the charging paragraphs of the *Toolson* and Radovich complaints:

Toolson.	Radovich.
"XI	"13
"That the defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:	"The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:
1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.	(a) That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League
2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the players' contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.	(b) That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than
3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other	

Toolson.

club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

5. That there shall be no negotiations between a player and any other club from the one to which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

Radovich.

his original employer unless the employer consents.

(c) That defendants agree that any player violating the reserve clause will be black-listed by all clubs in the National League so that no club in the said National League may hire him." (R. 9-10)

It is inconceivable that a decision upon the basis of the facts set forth in the *Toolson* complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

It is no cause for wonder that the Court below in the matter pending before us, after a full comparative analysis concluded, with reference to football:

"Its operation has just about the same aspects as baseball" (R. 75). The Court observed: "Football is a team sport". The brief of petitioner would lead one to believe that this was the only common note and that the decision of the Court of Appeals is an "exemption" for all "team sports". The argument is specious. It is true that baseball and football are each competitive team sports dependent for popular patronage upon a well rounded schedule of contests among teams of comparable strength. But the likeness does not end there. The Court found the sports to possess the "same *aspects*".

Baseball and football are each organized upon a league basis in order to provide a balanced program of events.

Major league baseball consists of the National League and the American League, each comprised of eight teams, which maintain intraleague schedules during a regular season. The championship teams of both leagues meet in the World Series to determine the world championship. Football is similarly organized into leagues. Major calibre football is embraced within the framework of the National Football League and its constituent Western Conference and Eastern Conference, each comprised of six teams. A regular season intra-conference schedule determines divisional champions who meet in a World's Championship game.

Each sport is presided over by a commissioner who is delegated regulatory and disciplinary power.

Each sport is subject to governing agreements providing organization and regulating operation. In baseball these provisions are found in the organic rules of the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs and in the Major-Minor League agreement. The rules governing professional football are found in the constitution and by-laws of the National Football League, an unincorporated association.

The governing canons of each sport prescribe generally and in common:

(a) That a uniform player's contract shall be employed by all teams.

(b) That such contract shall provide, for the benefit of the club, an option to renew the agreement respecting the services of a player.

(c) That a player may only perform for the team with whom he is under contract or to which such contract is assigned.

(d) Violation of a contract or of the clause which "reserves" the player to a team will result in the suspension of a player.

(e) Ineligible players may be reinstated only by ruling of the Commissioner.

It is these underlying agreements and particularly the "reserve clause" provisions thereof which have been the gravamen of all of the complaints filed against both baseball and football to challenge the status of such sports under the anti-trust statutes.

The petitioner has given full acknowledgment to the identical pattern of baseball and football by the very filing of a complaint modeled upon that found in the *Gardella* case and prompted by intimations there that the *Federal Baseball Case* was no longer the law. (Gardella decision Feb. 9, 1949. Radovich complaint filed July 5, 1949) A stipulation to defer the trial of the instant case until the Supreme Court had decided the *Toolson* case (R. 58) is further testimony of plaintiff's recognition of the parallelism existing between the sports.

Counsel for the Government in the brief for the United States filed with this Court in the *Boxing* case have also high-lighted the essential features of baseball to the degree that they are readily cognizable as the predominant char-

acteristics of the organization of professional football. In emphasizing the aspects of baseball which were not to be found in the boxing alignment the attorneys for the Antitrust Division have described the basic elements of football. Merely the name of the sport requires changing in the following argument:

> "Organized baseball is a tightly integrated organization of . . . clubs . . . which play many games each season. . . . But unlike most businesses, successful baseball operation requires that the competing teams cooperate with each other to insure that no one team attains too great superiority over its competitors . . . . For unless all teams in the league are of relatively equal playing ability, public interest soon wanes . . . Single exhibitions, however closely contested do not maintain public interest unless they are part of a larger drama—the quest for a championship . . . . The reserve clause, which has been described as 'the keystone of the entire structure of professional baseball' . . . is designed to achieve this equality among clubs for by tying players to particular teams it prevents the wealthier from buying up all the leading players. . . .
>
> "Thus unlike the reserve clause in baseball, there is no basis for assuming that the restraints which appellees have imposed on championship boxing can trace their genesis and growth to any decision of this Court. Furthermore in the Toolson case the complaint challenged the reserve clause, and if the challenge had been sustained, far-reaching changes in baseball's organization would have been required . . . "

The major portion of the language quoted from the Government's brief was culled from the report of the *House Committee on Monopolies* (*supra*). The portion quoted is to be compared with the following references made to professional football by the Court in *U. S.* v. *National Football League*, 116 F. Supp. 319:

> "Professional football is a unique type of business. Like other professional sports which are organized

on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably."

The comparable elements of baseball and football do not end with their present status but may likewise be projected into the future. In arguing the *Boxing* case the Government reasonably pointed out to the Court the absence of a circumstance which was of great weight in the *Toolson* case, namely, the chaos which would have resulted throughout baseball if the "reserve clause" had been invalidated:

"In baseball, if the challenge to the reserve clause in the Toolson case had been sustained, far-reaching organizational changes would have been required" (*Brief for United States*)

Doubtless such would have been the effect of a ruling adverse to baseball's reserve clause. But the results would not have been as "far-reaching" as those of a decision proscribing the "reserve clause" in the organization of professional football. It is to be remembered that base-

ball is all one family and it is not likely that the various teams would have undertaken an all-out raid upon the player talent of other clubs made "free agents" by the invalidation of the "reserve clause". The National Football League is not so situated. It controls a limited number of players only, and has been able to protect its interests from predatory rival leagues only through its "reserve clause". The in-roads which Canadian interests have been able to effect despite the "reserve clause" would indicate that the elimination of the clause would precipitate a full scale raid by the Canadian Football League upon the player talent developed by the National Football League over a period of years, at great expense.

(2) Radio—Television

Many of the antitrust attacks directed against the professional sports of baseball and football were undoubtedly prompted by statements in the opinions of Circuit Judges Hand and Frank in *Gardella* v. *Chandler*, 172 F. 2d 402, that developments in the transmission of narratives and pictures of baseball exhibitions had created a different set of facts than those which had confronted the Court in the *Federal Baseball* case. Obviously Radovich was aware of these opinions since he has attempted to qualify his claim for antitrust attention by alleging the impingement of professional football upon the radio-television field in the form of "lucrative contracts" (R. 7) granting rights to transmit reports of the games.

Interstate transmission of reports of sporting exhibitions is not a new feature. Judge Frank recognized that *Federal Baseball* involved the use of interstate telegraph to send "play by play" descriptions, but concluded that such phase had not been stressed in the earlier case (172 F. 2d, 402, 411). We can of course only speculate upon the influence of the telegraphic feature upon the thinking of the Court in the *Federal Baseball* case. We do know

however that it was before the trial court to the extent that the agreement between Western Union Telegraph Company and the National League of Professional Baseball Clubs was introduced as an exhibit by the plaintiff. (*Vol. 64 Transcript of Records, U. S. Sup. Ct. No. 204 (1921) p. 262*) and that the Court of Appeals of the District of Columbia noted "each league had a contract with a telegraph company for service". The then Supreme Court of the District of Columbia had theretofore held as a matter of law that "organized baseball" was in violation of the antitrust laws; and such summary treatment has deprived us of any finding which might have controlled the legal conclusion.

It is also clear that the relation of telegraph to baseball was urged as one of the interstate details in the presentation of *Federal Baseball* to the United States Supreme Court. At page 154 of the brief of the Plaintiff in Error is set forth:

> "We have not in the above discussion, made any reference to the various details of this business which reflect its inherently interstate character. It is common knowledge that baseball is the pre-eminent American sport. Millions of people follow the daily reports of the results of the games in the press, and in the large cities gather in the afternoons around the newspaper offices to see the bulletin reports of the scores. Not only so, but vast numbers of people travel from one city to another for the purpose of witnessing the games. Telegraph facilities are installed at all the ball parks in the Major Leagues, and in those of the more important Minor Leagues, where reports of the games are sent out and are received throughout the country. The Western Union Telegraph Company pays to the National League alone the sum of $18,000 annually for the exclusive privilege of having its wires on its grounds. Upon a scoreboard in each ball park the results of the games being played at the same time are indicated, so that the crowd assembled at each park is informed of the progress of the other games (Record, p. 262)."

We cannot agree with the interpretation placed upon this language by Judge Frank in the *Gardella* case, 172 F. 2d 402, 411, wherein he states that such language "merely called attention to the telegraph service as one of several factors tending to show the popularity and national character of 'organized baseball' ". It would rather appear that the reference to telegraph was made for the purpose which it purports to serve, namely, to show the "inherently interstate character" of Baseball.

Whatever the attempts to minimize its significance in the over-all decision it must be conceded that the element of interstate transmission of game reports was present in *Federal Baseball.* The fact that both football and baseball games are now carried by a different medium to the public cannot change those games from local affairs to inter-state affairs. That which is reported, the game itself, whether it be baseball or football are the same today as they were when radio and television were unknown to the public. It is conceded that broadcasting and telecasting across state lines constitute interstate commerce. However at the time of the *Federal Baseball* decision it had long been established that the telegraph was likewise an instrument of interstate commerce. See *Pensacola Telegraph Company* v. *Western Union Telegraph Company,* 96 U.S. 1, 24 L. Ed. 708; *Leloup* v. *Port of Mobile,* 127 U.S. 640, 8 S. Ct. 1380, 32 L. Ed. 311; *Western Union Telegraph Company* v. *Speight,* 254 U.S. 17, 41 S. Ct. 11, 65 L. Ed. 104. There can be no legal distinction between the transmission of the description of football or baseball games across state lines by radio or television and the transmission of such descriptions by telegraph and telephone. In the case of *Fisher's Blend Station, Inc.* v. *Tax Commission,* 297 U.S. 650, 56 S. Ct. 608, 80 L. Ed. 956 the Supreme Court of the United States in comparing communications by radio and by telegraph or telephone stated at page 654:

> " . . . In all essentials its procedure (radio broadcasting) does not differ from that employed in send-

ing telegraph or telephone messages across state lines, which is interstate commerce."

The fact that purchasers of rights from some clubs now also utilize radio and television as well as telegraphy for transmitting descriptions of football games does not distinguish the *Federal Baseball* case from the case at bar. Otherwise any local event which attracted the attention of the press or radio would become interstate. Numerous events which antedate radio and television have become popular subjects for broadcasting and telecasting. In a quick survey we can enumerate the Pasadena Tournament of Roses, New Orleans Mardi Gras, Philadelphia's Mummers Parade, Saint Louis' Veiled Prophets Pageant, Cheyenne's Rodeo and New York's Saint Patrick's Day Parade. Can it be argued that any of these events have been transformed into interstate activities by their adoption as objects for broadcasting or telecasting? They as well as professional football and baseball games would be carried on tomorrow exactly as they are today if for some cause radio or television ceased to exist. The essential and controlling difference, from the standpoint of interstate activity or commerce, between the reporting of a local event and the local event itself must not be overlooked.

The point which we are endeavoring to make is clearly stated by the New York State Labor Relations Board in *In re Herbert Bayard Swope*, 24 L.R.R.M. 1065. In that proceeding, the jurisdiction of the State Board over a dispute between employees and employers engaged in racing, was challenged on the ground that although racing had once been a local sporting event, interstate radio and television had changed it into an interstate one; hence, the State Board was without jurisdiction, the labor dispute being one within the jursdiction of the National Labor Relations Board. In answer, the New York State Labor Relations Board said:

"Present day radio broadcasting and television are something more than telegraphy, and we recognize that differences in degree may be tantamount to differences in kind. Both media, it is said, 'bring the event into the home', but that is more figurative than accurate. Although broadcasting and televising give a more dramatic portrayal than does telegraphy, the event itself does not thereby take place interstate. The race is still at its physical situs, even though electrical impulses convey sound and images to other points. We are not dealing here with regulation of such impulses. * * * Thus, whatever the difference between telegraphy on the one hand, and broadcasting and televising on the other, none of these form any part of Respondents' activities or alter the essential local character of the activity in which Respondents actually are engaged; namely, racing." (l.c. 1066)

Again, *In the Matter of Olympia Stadium Corporation,* 85 N.L.R.B. 389, the National Labor Relations Board refused to assume jurisdiction of a labor dispute between an employee and his employer, the Stadium Corporation, which was engaged in producing professional hockey matches which were both broadcast and televised, on the ground that notwithstanding the television and radio broadcast of such games they were local and not interstate events.

The fact that no allegation has been made that the respondents themselves are engaged in broadcasting or telecasting activities must also be kept in mind. Those who engage in transmitting the accounts of the games are engaged in interstate commerce. The defendants are not so engaged. The situation is similar to *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U.S. 436, 40 S. Ct. 385, 64 L. Ed. 649. There a suit brought by the advertising agency against the publishing company under the Sherman Act was dismissed, on the ground that the agency was not engaged in interstate commerce. Plaintiff there alleged that it was conducting an advertising agency

placing advertising in periodicals distributed by the publishing company and in other periodicals of other publishers, which were distributed throughout the United States; that the publications had enormous circulations (The Saturday Evening Post, The Ladies Home Journal, The Country Gentleman); that the publishing company dealt with the plaintiff and other advertising agencies throughout the United States; that the business of editing, publishing and distributing throughout the United States advertising matter contained in the publications, pursuant to contracts made with customers and advertising agencies, was in interstate commerce. Plaintiff alleged many other details of the publishing business and it is inconceivable that defendant publishing company was not engaged in interstate commerce. The question was, however, whether the "placing of advertising matter in publications of the defendant" was interstate commerce, or as was stated by the Court:

> " . . . the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant."

The Supreme Court said:

> "The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

Further the Court said:

> " . . . there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under Section 7 of the Sherman Anti-trust Act. The Court was right in dismissing the suit." (252 U.S. at 444)

It becomes abundantly clear that the respondents in the case at bar make a contract for the sale of radio and television rights. The defendants do not engage in the transmission of the accounts of games. Others do it. Blumenstock did not engage in the publication and distribution of magazines but only made contracts with others to do so.

In *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 151, 72 S. Ct. 181, 96 L. Ed. 162, the Supreme Court held a newspaper publisher to be engaged in interstate commerce and commented upon *Blumenstock* as follows:

> "The decision in Blumenstock Brothers Advertising Agency v. Curtis Publishing Co. related to the making of contracts for advertising rather than to the preparation and dissemination of advertising."

The *Blumenstock* decision stands squarely for the proposition that interstate activities of others, under contract with a principal party, do not place the principal party in interstate commerce.

Again, in *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742 (C.C.A. 9th), cert. den. 299 U. S. 613, 81 L. Ed. 452, the Court held activities to be beyond the operation of the Sherman Anti-trust Act which involved securing of locations for billboards and posters throughout the several States, despite the fact that posters and lithographs were purchased and manufactured in one state and transported into another for display purposes, "the display being essentially local in character after all transportation, local or interstate, had ceased". 85 F. (2d) 750.

So in the case at bar, the display of the television image, or of the aural account of the game, at the place where seen or heard, is essentially local in character. The transportation in the case at bar is performed by others.

(3) Validity and Reasonableness of the Reserve Clause

In view of the fact that the "reserve clause" is the fulcrum upon which all of the controversy relative to these two sports is centered, specific comment upon this feature is indicated. The nature, history and purpose of the "reserve clause" were before the Courts in the *Baseball* cases, both old and new. Baseball had originally attempted to operate without a "reserve clause" and the attempt was disastrous (*H.R. Rep.* 2002, pp. 18-19). All of the outstanding talent became concentrated in one or two teams, resulting in unequal contests which discouraged patronage and caused financial loss. The Court of Appeals in the *Federal Baseball* case was thoroughly apprised of the situation when it stated:

> "If the reserve clause did not exist, the highly skilful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them". (269 F. 681, 687).

In *United States* v. *Shubert*, 348 U.S. 222, this Honorable Court has stated that the baseball cases may be construed as "specifically fixing the status of the baseball business under the antitrust laws *and more particularly the validity of the so-called 'reserve clause'*" (emphasis ours).

The attorneys for the Government in the brief submitted to this Court in the *Boxing* case concede the validity of the "reserve clause":

> "The gravamen of the complaint in the Federal Baseball case was the alleged illegality of the so-called 'reserve clause' in the players' contracts, under which a player once he signs his first contract with organized baseball, is precluded from ever playing for another club unless he is sold or released (citing H. R. Report supra p. 114). The holding in Federal Baseball that baseball was not interstate commerce had the practical

effect of insulating the reserve clause from attack under the Sherman Act" . . .

"The reserve clause which has been described as the 'keystone of the entire structure of professional baseball' (Report p. 228) is designed to achieve this equality among clubs, for by tying players to particular teams it prevents the wealthier clubs from buying up all the leading players. (id. pp. 105, 208):"

The House of Representatives Committee heretofore referred to in its conclusions, stated:

"On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause" (*H.R. Rep. No. 2002, 82nd Congr. 2nd Sess. p. 229*)

Whatever may be the status of the other aspects of baseball with respect to antitrust laws it is clear that the control of player talent by means of the reserve clause is not in violation of the acts, either by virtue of congressional intent or by virtue of the reasonableness of the restraint exercised. It is inconceivable that the same reserve clause sanctioned in baseball should warrant condemnation when adopted by football. If, however, there is some distinction which precludes the application of the baseball cases to football's identic pattern may we point out that the court below has determined that the controls exercised by football, considered as and by itself, are "reasonable restraints":

"In professional football very good arguments do exist for the indulgence of restraints on individual players" (R. 76)

The position of the Court of Appeals is most sound. The same arguments advanced to uphold the baseball pattern apply with equal force to the football picture. It must be obvious to all, as it is to Congress, that the reserve clause is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The clause is even more urgent in the conduct of football. Disparity in team strength is much more obvious in football than in baseball. Also baseball affords more opportunity for individual play than does football. In football the cohesiveness of the team is the principal factor for success. Such cohesiveness requires long periods of practice and play with the same roster of players. In baseball a pitcher may leave one club to join another and be available for play upon the day of his arrival. In football a quarterback transferring from one club to another may be valueless to the succeeding club for a whole season. The intricacy of play patterns and signals, the talents of his team-mates and the timing of play executions are not quickly learned.

The reserve clause in addition to providing team continuity and cohesion likewise contributes to the integrity of the sport. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is a means to prevent a "slow-down" effort by a player when competing against an opposing team with whom the player may desire future affiliation.

Just as football is able to offer arguments why the reserve clause is even more essential to its type of play than to that of baseball, so too is football able to point out that the pattern which it has adopted from baseball has not been extended to the points of aggravation which have invited criticism upon the sport of baseball. The record in *Federal Baseball* discloses that the cause for concern in

the baseball pattern was not the organization of a league of teams with internal control but organization of a greater magnitude than league scale. (*Brief of Plaintiff in Error p. 164-5*) Football operates no "farm systems" and attempts to control only those players under contract to its twelve clubs constituting but a single league, limiting each club to 33 players, exclusive of those on the injured or retired reserve lists. Most important the National Football League does not control or attempt to control the sources of player talent. Baseball maintains dominion over the player market down to the very sand-lots. A vast net-work of minor leagues embraces every player of even suspected talent. In football the National Football League obtains its players from the colleges, service teams and amateur groups, sources which are equally accessible to any other competitor, as is evidenced by the success of the Canadian football league in obtaining talent from the United States.

In this phase of the argument there is emphasized the fact that the Complaint fails to contain allegations from which it may be determined or inferred that a claim for relief is therein stated. Throughout the history of the enforcement of the Act, this Court has continuously confirmed the vagueness of the statutory language of Section 1 of the Sherman Act with the resultant duty upon the Court to interpret it, *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 474, 53 S. Ct. 471, 77 L. Ed. 825; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489, 60 S. Ct. 982, 84 L. Ed. 1311; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 526, 68 S. Ct. 1107, 92 L. Ed. 1533, emphasizing the necessity for generality and adaptability such as is found in constitutional provisions. Hence, it is the courts, according to the rule enunciated in the cases just cited, which have been left to give content to the statute.

So, in *United States* v. *Associated Press*, 52 F. Supp. 362, aff'd, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013, District Judge Swan said at p. 370:

"Certainly such a function is ordinarily 'legislative'; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, *and by so doing has delegated to the courts the duty of fixing the standard for each case.* Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left these particular controversies to the courts, where they have been from very ancient times." (Emphasis supplied.)

In discharging that function of giving content to the statute, and interpreting its broad and general provisions, this Court has for nearly fifty (50) years held that an *unreasonable* restraint on the free flow of interstate commerce must be alleged and proved. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 179, 180, 31 S. Ct. 632, 55 L. Ed. 663; *Times-Picayune Publishing Co., et al.* v. *U. S.*, 345 U. S. 594, 622, 97 L. Ed. 1277, 73 S. Ct. 872.

As has been shown, the professional football league and its member clubs are completely different from almost every other kind of enterprise. "The League is truly a unique business enterprise, which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs." *U. S.* v. *National Football League, supra*, 116 F. Supp. 326. Hence, even though the Sherman

Act and amendments thereto are applied to the conduct of the game and to player regulations designed to promote competition, the "rule of reason" demands that the player contracts alleged to be in force be regarded as "reasonable," not in contravention of the act. For the Court so to hold is but to discharge the function of interpretation of the antitrust laws described above.

Indeed the Court need not go even that far to sustain the holding of the courts below that the Complaint fails to state a claim upon which relief can be granted. For plaintiff fails utterly to allege that the uniform player's contract is "unreasonable," or that the enforcement thereof against himself is "unreasonable."

That the uniform player's contract of the National Football League *is* reasonable, however, has inferentially already been held, for the property rights of the teams in their own players must exist for the reasons stated and to permit the conclusions referring to the players set out in *U. S.* v. *National Football League, supra,* 116 F. Supp. 323, 324:

> "It is particularly true in the National Football League that the teams should not compete too strongly with each other in a business way. The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. There are always teams in the League which are close to financial failure. Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.
>
> "The winning teams usually are the wealthier ones and unless restricted by artificial rules the rich get richer and the poor get poorer (as Commissioner Bell put it). Winning teams draw larger numbers of spectators to their games than do losing teams and from the larger gate receipts they make greater profits than do losing teams. With this greater wealth they can spend more money to obtain new players, they can pay higher salaries, and they can have better spirit among their players than can the weaker teams.

With these better and happier players they will continue to win most of their games while the weaker teams will continue to lose most of their games. The weaker teams share in the prosperity of the stronger teams to a certain extent, since as visiting teams they share in the gate receipts of the stronger teams. But in time even the most enthusiastic fans of strong home teams will cease to be attracted to home games with increasingly weaker visiting teams. Thus, the net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater inequalities in the strength of the teams; second, the weaker teams being driven out of business; and third, the destruction of the entire League.

"In order to try to keep its teams at approximately equal strength and to protect weaker teams from stronger teams, a league theoretically might use a number of devices. It might (1) limit the bonus price which could be paid to new players, (2) give the weaker teams a prior right over stronger teams to draft new players, (3) prohibit the sale of players after a certain day in the playing season, (4) limit the number of players on each team, (5) limit the total amount of salaries which a team can pay, (6) give the lowest team in the league the right to draft a player from the highest team, when and if the highest team has won a certain number (three for instance) of consecutive championships, and (7) reasonably restrict the projection of games by radio or television into the home territories of other teams."

Indeed, if the teams of the National Football League could not lawfully protect their property rights[1] in their players, by the use of their uniform contract, the League might well be utterly destroyed since nothing but chaos

[1] It is clear that each team has property rights in its players. Ever since *Lumley* v. *Wagner*, 1 DeG. M. & G. 603, and *Lumley* v. *Gye*, 2 Ellis & Bl. 216, property rights in unique personal services have been recognized. See, *House Committee Report, Organized Baseball, supra, p. 127, et seq.* The lack of reported decisions involving professional football players attests to the respect accorded the players' contract by the players themselves.

would result to the entire organization, built upon the sanctity of player contracts for thirty-five years.

(4) Boxing and Shubert Distinguished

The brief of petitioner is marked by a studied avoidance of any comparison between the sports of baseball and football or their constituent elements. From petitioner's brief one might obtain the impression that a lone *Boxing* case and one of the three opinions in the *Gardella* case were the only instances of judicial treatment in the field of sport. Fortunately the Court below was more comprehensive and made a full analysis of all of the cases in this field. The conclusion was that the *Boxing* case was not controlling since football and baseball were comparable and both differed from boxing.

In support of the position of the Court below we have hereinbefore stressed the similarity between football and baseball. May we now indicate the dissimilarity between football and boxing. The two are clearly distinguishable in organization and operation. That football and baseball are team sports unlike boxing is but an introduction to the variances. Boxing requires no league organization for the promotion of competition among teams and consequently requires no control of athletic talent to insure teams of competitive strength. Any individual promoter with requisite capital can stage a championship fight. There is absolutely no basis nor justification for a situation where all of the prime boxing talent should be under the domination of one promoter. Only public distrust can result from a series of matches and "return matches" among stable mates. No uniform players' contract enters into a consideration of boxing. The reserve clause which may well be called the "keystone of the entire structure" of professional football, as it has been described with reference to baseball, has no relation to the conduct of boxing. The sanctions which baseball and football find necessary to impose in order to enforce player control have no counterpart in boxing. The importance of radio and television in the staging of boxing events is a further differ-

entiating note. Many boxing shows are staged solely for the television audience; the sale at the boxoffice is nugatory. Proceeds from broadcasting and television are alleged to be in excess of 25% of the total revenue by the *Boxing* complaint. The record in *U. S.* v. *National Football League*, 116 F. Supp. 319, discloses that the revenue from the sale of both radio and television rights by the member teams of the National Football League for the five-year period 1947-1951 amounted to only 4.05% of total revenue. The sale and distribution of motion pictures of boxing contests to 18,000 theatres and the live and simultaneous telecasting of the events to audiences in 200 theatres throughout the country are further features associated with boxing and not found in the football format.

While considering statistically the relative position of radio and television in the staging of boxing and football exhibitions it might be well to inject parenthetically the allegation in the *Toolson* complaint respecting this element:

> "That the aforesaid production of games and narration by radio and transmittal by television to the outside public in the various states of the United States is a substantial part of the business of professional baseball in that the receipts from such activities exceeds $1,000,000.00 each year and exceeds the sum of 20% of the net profits of professional baseball each year." (Toolson complaint par. IX)

The complaint in the *Boxing* case presents an entirely different set of facts than that with which we are confronted. The Boxing combination did not attempt to stabilize a sport but to eliminate a competing promoter, to acquire exclusive right to promote professional boxing contests in all the principal arenas where championship matches could be successfully presented and to obtain the agreement of each title contender to take part only in title contests promoted by the defendants.

The difference between Boxing and Football are well set forth in the brief of the government filed in the *Boxing* case. The contrast made is between baseball and boxing

but the distinguishing features delineated are equally applicable in contrasting football and boxing.

Attorneys for the Government emphasize the importance of the "reserve clause" in the baseball structure and its absence in the boxing order. Considerable stress is directed to the fact that the organization of baseball was undertaken in reliance upon a ruling of the Courts that the "reserve clause" was a valid device, whereas:

> "Professional boxing, on the other hand, appears to have undergone little, if any, structural change since 1922, and it cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act. Indeed, the restrictive practices upon which this suit is based were instituted only five and one-half years ago (pars. 17, 20-23, R. 5-7), and they involved only competitive practices, not the basic structure of the business." (*Brief for the United States*)

The same distinctions may be made between boxing and football in view of the basic "reserve clause" in the football structure and a reliance upon the validity of "reserve clauses" since 1921. In fact the hereinafter quoted paragraph from the brief of the government may, with but a change of name, stand as a pointed reference to football:

> "The economic characteristics of the two sports and the practical consequences of holding them subject to the Sherman Act, are markedly different. Organized baseball is a tightly integrated organization of several hundred clubs which play a great many games each season. But, unlike most businesses, the competing teams in a league must co-operate to insure that no team becomes much superior to its competitors, otherwise public interest will wane. Championship boxing is conducted on a match-to-match basis, bouts are held relatively infrequently, the business has developed no comparable organization, and there is no need to maintain similar equality of competitors. In baseball, if the challenge to the reserve clause in the Toolson case had been sustained, far-reaching organizational changes would have been required. Granting the relief sought by the Government in the instant case,

however, would not require substantial changes in the basic structure of championship boxing. Accordingly, there are no reasons, either legal or practical, which would justify application of the rule of stare decisis to preclude the Court from deciding now whether the boxing business, as conducted by appellees in the manner described in the complaint, is subject to the Sherman Act."

In summation, it is apparent that the *Boxing* case and the case at bar differ both factually and in the legal issues presented. Boxing could not claim to be identic in pattern with baseball and could show no reliance upon *Federal Baseball* in the development of its organization. It could not deny that it had become virtually a television production with but a studio audience in attendance. Boxing had come before the Court contending that all athletic exhibitions were free of antitrust restrictions. Football takes no such extreme position, realizing full well that all sports are subject to the impact of the laws, contending merely that an aspect of internal organization found unobjectionable in the baseball format is equally unobjectionable when presented in the pattern of professional football. In *Boxing* it was also conceded that if the antitrust laws were applicable, the complaint stated a cause of action. Respondents here insist the complaint of Radovich fails to state a claim regardless of the determination respecting the applicability of the Baseball cases.

There appears to be little basis for comparison between *United States* v. *Shubert*, 348 U.S. 222 and the case at bar. Only the frequent citation of the case by petitioner prompts a discussion of its inapplicability. There is no similarity of facts. Certainly the legal position there urged was extreme and untenable. The argument that *Federal Baseball* and *Toolson* were applicable to all personal exhibitions indicates a failure to appraise the baseball cases and to restrict them to their true import. That is believed to be the meaning of the decision of this Court in holding that if the *Toolson* decision were to be expanded

or contracted, Congress should do it. Football neither requires nor requests an expansion of *Toolson*. It merely urges that *Federal Baseball* be applied.

The plea for recognition of the doctrine of *stare decisis* by the theatre interests is likewise an ill-founded contention in the *Shubert* case. As the Opinion states:

> "The rule of stare decisis undoubtedly embodies a policy of basic importance but the rule cannot help the defendants here. If it is to be applied, Hart[2] and the Motion Picture cases—not Federal Baseball and Toolson—are the controlling decisions."

B. FAILURE TO STATE A CLAIM

(1) (a) Causal Connection

In a treble damage action under § 4 of the Clayton Act it is fundamental that a complaint must show, among other things that a violation of the antitrust statutes was the cause of damage to the plaintiff in his person or property. The statute is specific that the right of action exists for the benefit of a person "who shall be injured" . . . "*by reason of anything forbidden in the antitrust laws.*" (Clayton Act § 4)

That language is construed in *Hart* v. *B. F. Keith*, 12 F. (2d) 341, 345 as follows:

> "The plaintiff who seeks recovery must bear the burden of proof, not only that there was an attempt or actual monopolization or a combine or conspiracy in violation of the antitrust law, but it must be shown that there was injury to him as a *proximate result.*"

The requisites of a complaint predicated upon the right afforded in § 4 were prescribed by the court in *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742, 754 (cert. den. 299 U.S. 613):

> "In the absence of an allegation of the *causal connection* between the damage, and the conspiracy to

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[2] *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271.

restrict interstate commerce in posters no cause of action is stated under the Sherman Antitrust Act."

In *Beegle* v. *Thomson* (C.C.A. 7), 138 F. (2d) 875, the court, in holding that the district court had properly dismissed a count for treble damages, said:

> "Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act. (citing numerous cases) Inasmuch as the count embraced no such essential averments the court properly entered judgment dismissing it." (l.c. 881.)

In *Twin Ports Oil Co.* v. *Pure Oil Co.* (D.C. Minn.), 46 F. Supp. 149, the court said:

> "At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal proceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding." (l.c. 152.)

The complaint of Radovich relates a connection between football and "lucrative contracts for the interstate communication by radio and television of the playing of the games." (R. 7) It is this tenuous "connection" upon which petitioner relies for his claim that every aspect of Respondents' activities are interstate commerce. This is a complete disregard of the dog in appraisal of the function of the tail. It overlooks the fact that the tail is susceptible of amputation without impairment of the efficiency of the animal; that the sport operated profitably without radio and television and was practically compelled to grant broadcasting and telecasting rights by Government ukase.

The complaint in the case at bar however makes no contention that respondents themselves are engaged in the business of radio or television. It does not allege that anything done by these respondents has in any manner restrained or attempted to monopolize radio or television, or that anything done by respondents in these interstate aspects of their activities caused any damage to plaintiff. The words of Justice Minton in the *Boxing* case are not only apposite but even more appropriate by reason of the relative insignificance of radio and television in the football realm:

> "We are not dealing here with the question of whether the respondents have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The respondents have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and the sponsors into the case."

The same position was adopted by Judge Chase in his opinion in *Gardella* v. *Chandler*, 172 F. (2d) 402, 406:

> "Nor are there any allegations as to any monopoly to control, or any conspiracy to create one to control, the prices at which the rights to send descriptions of the games, visually or otherwise, are sold; and as much is true as to the advertising by the purchasers of those rights. Nor as to what effect, if any, such by-products of the games have upon the prices at which goods are sold in commerce or upon the purchasers and consumers of those goods. Nor that what is done in respect to broadcasting or telecasting the games has any causal connection with the damage the appellant alleges. See F. & K. Co. v. Special Site Sign Co., 9 Cir., 85 F. 2d 742, certiorari denied, 299 U.S. 613, 57 S. Ct. 315, 81 L. Ed. 452."

Obviously the crux of the Radovich complaint is the "reserve clause" feature of football's operation and nothing else. This is patent from a very clumsy attempt to tie the "reserve clause" into broadcasting and telecasting:

> "The contract hereinafter described between the football players and the defendants including the so-called 'reserve clause' relate not only to the local exhibition of football games but necessarily as well to the interstate broadcasting and televising thereof." (R. 8-9)

The allegation taken out of thin air for use as a binder is meaningless if not preposterous. From the balance of the complaint it is obvious that the "reserve clause" has absolutely no relation whatever to the fields of radio and television. The sale of rights to net-works or advertisers was in no manner affected by a provision in the players' contract that the club had the option to renew the services of the player.

The complaint fails to suggest, much less affirmatively show, that the player regulations had a substantial or any effect upon interstate trade or commerce. It is certain that they were not intended to affect interstate trade or

commerce. Their object was to insure the requisite amount of seasoned players for each club and evenly balanced teams in order to offer to the public the best competition possible. Conceding that the club owners contemplate the transportation of players across state lines, with their paraphernalia, it is obvious that the player regulations do not affect the number of players traveling in interstate commerce. They would be the same regardless of the effect of the player regulations upon individual players.

The allegations respecting the part played by radio and television in the makeup of professional football are wholly immaterial. As above indicated it is not claimed that respondents have attempted to monopolize these admittedly interstate factors. Even had there been such a contention the allegation would still be immaterial. Plaintiff is not engaged in broadcasting or televising. His claim rests solely upon his contention that the player regulations prevented him from obtaining employment as a professional football player. Any restraints upon the sale of broadcasting and telecasting rights, if they exist, plainly do not damage the plaintiff in his business or property; and he can not invoke a judicial determination with respect to the existence and validity of alleged restraints by which he is not proximately damaged.

In *Glenn Coal Co.* v. *Dickinson Fuel Co.* (C.C.A. 4) 72 F. 2nd 885, 887, the court said in part:

> "To recover, the plaintiff must establish two things: (1) A violation of the antitrust act and (2) *damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the act.*
>
> • • • •
>
> "A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages."

Parts IV and V of the Complaint (R. 9-15) recite the "Combination and Conspiracy" and "The Boycotting and Blacklisting of Plaintiff". These portions of the complaint relate solely to player regulations and their imposition upon plaintiff by reason of his contract "jumping". From such recitals it is concluded:

> "31. By reason of the aforesaid violations of the anti-trust laws, defendants have injured the business of plaintiff by actively eliminating him from the business of organized football; they have suppressed competition and have monopolized the business of organized football; they have eliminated competition among themselves and prevented new competition; they have sought to impair the competition of the All America Conference; they have effectively placed all football players within their control in a condition of bondage through use of the uniform contract of the National League." (R. 16)

Plainly, the petitioner here has failed to allege in his complaint that he has suffered any damage from any act of the Respondents which impinges upon the field of interstate commerce. If plaintiff alleged damages, which he has not, those damages are attributable to the restraints created by player regulations.

The observations of the Supreme Court in *Board of Trade* v. *U. S.*, 246 U. S. 231, 238, are most pertinent. In that case the Board of Trade had a rule prohibiting any of its members between sessions from offering to buy grain other than at the closing price at the last session. The Government, claiming that this was an undue restraint upon interstate trade and commerce, brought suit to enjoin its enforcement. The Board of Trade in its answer alleged that the purpose of the rule was not to prevent competition or to control prices, but to promote the convenience of its members. On motion of the Government the averment was stricken from the answer and the relief prayed for by the Government granted. On direct appeal to the

Supreme Court, the judgment was reversed, the court saying:

> "No opinion was delivered by the district judge. The government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Antitrust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."

The decision in *Hart* v. *Keith*, 12 F. 2d 341, affords us a further vantage point from which to view the complaint of Radovich. In that opinion at page 345, the court observes:

> "The plaintiff has testified as to the refusal of the the defendants to do business with him . . . He says much, by his own admissions, to justify the reason for refusing to do business with him."

Does not Radovich by his own allegations justify the refusal of respondents to admit him back into their organization? Admittedly he violated the obligation of his contract with Detroit and "jumped" to the Los Angeles

Dons upon the inducement of a higher salary. As the *Hart* case concludes:

> "The right of a person to do business with whomsoever he desires is well established (citing cases). There is no reason based on the common law or the Sherman Law, which requires the defendants to do business with plaintiff, if he is objectionable to them and that objection is based upon sufficient reason."

It is even questionable that the Radovich complaint alleges damage from any cause. The plaintiff states that by jumping from the Detroit Lions to the Los Angeles Dons he improved his financial position. His salary with Detroit was $3250 per year. The Los Angeles Dons paid him $6500 (R. 12). He has alleged an offer of employment from the San Francisco Clippers at $5000 per year and the retraction of the offer by reason of the blacklisting (R. 15). Damages prayed in the amount of $35,000 are based upon a claim that "defendants have injured the business of plaintiff by actively eliminating him from the business of organized football". (R. 16)

Other portions of the complaint inform us that the "black-listing" of the plaintiff involved only the members of the National League and what plaintiff has referred to as its "Pacific Coast Division" (R. 15). The existence of a rival All America Conference is alleged and the willingness of such league to pay plaintiff a greater recompense than the National League (R. 14). Yet plaintiff does not allege that he was prevented from obtaining employment as a football player with the All America Conference. Nor does he allege that he was thereby unable to obtain employment with teams engaged in playing in any other conferences. The complaint is eloquently silent on the matter of employment with the Canadian League. Certainly plaintiff, who did play football in the Canadian League during the period complained of, has not alleged that employment was unavailable in such league. Plain-

tiff further fails to allege that he did not obtain other employment, football, or otherwise, for a sum equal to, or in excess of the amount which he was foreclosed from earning by any alleged action of respondents.

Here it is pertinent to invite attention to the following authorities to the same effect as those already cited in this section of this brief, on the narrow point that assuming *arguendo*, violation of the antitrust laws is effectively alleged, plaintiff has failed to allege any damage or harm resulting to himself therefrom:

Revere Camera Co. v. *Eastman Kodak Co.*, 81 F. Supp. 325, 330 (N. D. Ill. E. D.);
Momand v. *Universal Film Exchange*, 172 F. 2d 37, 42, 43 (1st Cir.), *cert. denied*, 336 U. S. 967, *rehearing denied*, 337 U. S. 934 and 337 U. S. 961; also District Court opinion 72 F. Supp. 469, 478 (D. Mass.);
Turner Glass Corporation v. *Hartford-Empire Co.*, 173 F. 2d 49, 51, 52 (7th Cir.);
Twin Ports Oil Company v. *Pure Oil Company*, 119 F. 2d 747, 751 (8th Cir.), *cert. denied*, 314 U. S. 644, *rehearing denied*, 314 U. S. 711;
Jack v. *Armour & Co.*, 291 Fed. 741, 745 (8th Cir.);
Keogh v. *Chicago & N. W. Ry. Co.*, 271 Fed. 444, 447 (7th Cir.), aff'd, 260 U. S. 156;
Leonard v. *Socony-Vacuum Oil Company*, 42 F. Supp. 369, 370 (W. D. Wis.), App. Dis., 130 F. 2d 535 (7th Cir.).

The rule was the same at Common Law: *Scavenger Service Corporation* v. *Courtney*, 85 F. 2d 825, 832 (7th Cir.).

In *Keefe* v. *Derounain*, 6 F. R. D. 11 (N. D. Ill. E. D.), the Court said (p. 12):

> "• • • the gist of a civil conspiracy action is not the conspiracy itself, but the damage resulting to the plaintiff from acts done under the conspiracy."

Thus, in the absence of allegation of harm accruing to himself, a necessary averment, plaintiff's Complaint fails to state a claim for relief.

(1) (b) Members of League as Quasi-Partners

To refer to a conspiracy among the member teams of the National Football League is to disregard the nature of the enterprise. The members are not business competitors in the accepted sense. They are engaged in a joint venture in which the success of any is dependent upon the success of all. A weak member seriously affects all members. This unique aspect of league operations is the subject of comment in *U. S.* v. *National Football League, supra,* as hereinabove quoted. Under the quasi-partnership relationship so existing the members had the right to adopt regulations to control the internal operation of the league provided no public harm was caused by such regulations. Certainly the relationship of the various teams is much more of a reality than that of the members of the Chicago Board of Trade, whose internal regulation was found not to be objectionable in *Board of Trade* v. *U. S., supra.*

In the celebrated *U. S.* v. *Addyston Pipe and Steel Co.,* 85 Fed. 271, aff'd 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136, in upholding the principle that only unreasonable restraints of trade violate the Sherman Act, the Court cited illustrations of covenants in partial restraint of trade, generally upheld as valid (85 Fed. at 281), as follows:

> "... Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business

retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the things sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business . . ."

The *Addyston* decision followed the development of the English law on restraint of trade (1 *Toulmin Anti-Trust Laws*, Vol. 1, p. 49, Section 2.15) and there has never been any deviation in the Federal Courts from the law there enunciated. *U. S.* v. *Bausch & Lomb*, 45 F. Supp. 387, 398, aff'd 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024.

As has been shown, the members of the National Football League are in a sense partners, each club being interested in the success of its co-member, and each club being interested in the maintenance of organized and regulated play of the game, for the reasons heretofore stated. Thus, agreements between the club "partners pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm," is a traditionally recognized agreement at common law which violates no modern principle of Anti-Trust law protection.

The principle of quasi-partnership in modern business, although the relationship of the parties is not actually a partnership in the conventional sense, has been recognized in *U. S.* v. *Bausch & Lomb*, *supra*, 45 Supp. at p. 398, where the Court said:

"The arrangement, though not a partnership in legal form, is functionally a joint enterprise in which one will produce and the other market a commodity."

As a result of the application of the foregoing principle, it may be seen that an agreement to adopt and enforce the uniform player's contract, alleged by plaintiff to exist, contains no provisions more invidious than those characterized in the simple statement: *the adoption and enforcement of an agreement of partners not to re-engage an employee, who quit his job.* That simple statement, without more, should dispose of plaintiff's alleged claim of an Anti-Trust law violation.

Thus, *as a matter of law,* it appears that it would be unreasonable to hold that the professional football teams, comprising a league, could not lawfully protect their property in the services of players, *under contract,* by agreeing (a) not to invade each other's rosters and (b) not to develop playing skills or impart confidential systems of play for the use of disloyal players. This, not only for the necessity of the teams but for the guarantee to the public of maximum effort by the players in the contests. It would be "unreasonable" to proscribe the uniform contracts because it would be contrary to human experience.

International Boxing and *Shubert* present entirely different problems. There, the United States attacked an entire system. In the case at bar, only a narrow part of a system is attacked by a single player. As in *Toolson* and *Kowalski,* where this Court was not impelled to depart from the rule of *stare decisis,* so in the case at bar the Court may well held that there appears from the allegations of the Complaint no facts tending to establish that the adoption and enforcement of a uniform player's contract is "unreasonable," and no public interest or "public injury" is thus alleged or to be inferred. Moreover, in *Boxing* (348 U. S. 225, 226) and *Shubert* (348 U. S. 240) this Court said in identical language:

> "defendants do not deny that the allegations state a cause of action . . ."

In the case at bar, defendants *do* "deny that the allegations (of the Complaint) state a cause of action."

(2) The Complaint Fails to Allege Injury to the Public

The right of plaintiff to recover treble damages is incidental and subordinate to the protection of the public and it was created to induce private persons to aid in enforcement of the Anti-Trust laws. Hence, to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury. *Shotkin* v. *General Electric Co.* (10th Cir.), 171 F. 2d 236, 238-9; *Feddersen Motors* v. *Ward* (10th Cir.), 180 F. 2d 519, 521-2; *Citizens Pub. Co.* v. *Merchants & Manufacturers Assn.* (D.C. D. of C.), 83 F. Supp. 994, 997; *Riedley* v. *Hudson Car Co.* (D.C. Ky.), 82 F. Supp. 8, 10; *Glenn Coal Co.* v. *Dickinson Fuel Co.* (4th Cir.), 72 F. 2d 885; *Myers* v. *Shell Oil Co.* (D.C. Cal.), 96 F. Supp. 670, 674; *Arthur* v. *Kraft-Phenix Cheese Corp.* (D.C. Md.), 26 F. Supp. 824; *Abouaf* v. *Spreckles Co.*, 26 F. Supp. 830, 832-3.

In considering the allegations of the Complaint, it must also be borne in mind that plaintiff does not allege his ownership of a football team or a rival League or that he was in the business of engaging the services of other football players. Thus, the citations of the cases set out immediately above are apt. For example, in *Feddersen Motors, Inc.*, plaintiff failed to allege efforts of competitors to suppress competition or to create a monopoly in favor of the competitors. In *Citizens Pub. Co.*, plaintiff did not allege that defendants were engaged in a competitive business, that of publishing a newspaper. The Court said:

> "Obviously, the acts charged to defendants do not tend to create any monopoly of the newspaper publishing business on the part of the defendants. They are not engaged in that business."

It is certainly clear that for public injury to be inferred, there must be an allegation that competition exists between plaintiff and defendants, and the respondents in the case at bar are not in the business of "playing" football, any more than plaintiff is in the business of operating a football team or a rival league.

To give rise to an unreasonable restraint of trade, competitors of the alleged transgressor must exist in the area in which the restraint is exercised, or the alleged transgressor must adopt unreasonable means to prevent competitors from entering that area. *U. S.* v. *Inter-Island Steam Nav. Co.*, 87 F. Supp. 1010, 1020, 1021 (D. C. Hawaii).

In *Apex Hosiery* v. *Leader*, 310 U.S. 469, 500, 60 S. Ct. 982, 996, 84 L. Ed. 1311, 1327, this Court stated the policy of the Act as follows:

> "In the cases considered by this Court since the Standard Oil case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the *restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices.* Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, *unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*" (citing cases.) (emphasis supplied).

Again, *Standard Oil Co.* v. *U. S.*, 221 U.S. 1, 58, 31 S. Ct. 502, 515, 55 L. Ed. 619, 644, the Court stated:

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said

that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that *they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices which were considered to be against public policy.*" (emphasis supplied)

In *Black & Yates* v. *Mahogany Ass'n.*, 34 F. Supp. 450 (D. Del.) aff'd on this point 129 F. 2d 227, 231 and 232 (3d Cir.), the District Court in dismissing a claim based on the Sherman Act stated (34 F. Supp. 456):

"It is necessary to establish by facts well pleaded not only that a combination exists but that it has a 'necessary tendency to cause direct and undue restraint of competition in commerce' . . . Here there was no agreement affecting production, fixing prices or trade maintenance. Members of the association are free to sell as they choose. The anti-trust acts have a single purpose: *To prevent any combination of persons from monopolizing commerce in a particular commodity and destroying competition in trade to the injury of the public*". (emphasis supplied)

In *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447 (N.D. Ill. E.D.), the Court stated, p. 448:

"Section 1 of the Sherman Act prohibits a monopoly as a result of conspiracy or combination causing a substantial dominance or exclusion of competitors, and

Section 2 prohibits monopolizing, i.e., the acquisition of power to fix prices, limit production or deteriorate quality. The allegations of amended paragraph 7, 39, and 40 indicate reliance by plaintiff upon a violation of Section 1 of the Act, with the exception of the general charge in paragraph 65 stating that because of such domination 'defendant has been able to and has increased the price of its said products in such foreign trade.' This latter is a mere legal conclusion of the pleader and no facts appear in any count to support it. It is necessary for plaintiff to allege with a degree of certainty and definiteness the conspiracy or combination *to restrict free competition in the sale and distribution of gas regulating equipment in order to state a cause of action.*" (emphasis supplied)

In *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 825, 826 (D. Md.), dismissing a complaint, the Court said, in justifying defendant's refusal to sell:

> ". . . it does not justify a suit . . . unless the effect of the refusal was to substantially lessen competition . . ."

Plaintiff alleges only that by virtue of the adoption and enforcement of a uniform player's contract, and because of his own breach of it, he could not obtain engagement in the National Football League, or its "Division." Those allegations, if proved, would fail to establish a substantial injury or indeed any injury to the public. Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.

(3) The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim for Relief Set Out in the Complaint

Plaintiff claims that defendants by agreement contained in the uniform player's contract have refused to employ him in their professional football league. A refusal by

employers, whether singly or in concert, to employ any party to a labor dispute is declared by the Clayton and the Norris-LaGuardia Acts (29 U.S.C. § 52; 29 U.S.C. §§ 101-15) not to be considered or held to be in violation of any law of the United States. Hence, the complaint is fatally defective.

The allegations of the complaint reveal nothing more than a controversy between the employee and his employer and their association concerning terms and conditions of employment. Radovich alleges that he was under contract to the Detroit Lions; that he committed a breach of his contract; that he was placed on the ineligible list, and that by agreement the ten member football clubs of the National League refused to allow him to play in the National League, or its "Division".

The primary object of Congress, both in the Clayton Act and the Norris-LaGuardia Act, was of course to benefit labor; to make is entirely clear that direct strikes and secondary boycotts would not subject labor to civil or criminal prosecution under the Sherman Act.

While this undoubtedly was the primary object of Congress, both the wording of the Acts and their legislative history show that there is no doubt that so far as the definition of a labor dispute is concerned the provisions of both Acts were intended to apply equally to employers as well as employees.

Section 20 of the Clayton Act (29 U.S.C. § 52) provides in part as follows:

> "And no such restraining order or injunction shall prohibit any person or persons, *whether singly or in concert* . . . from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" (emphasis supplied)

Section 1 of the Clayton Act (29 U.S.C. § 53) provides:

> "The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Plainly, plaintiff's attempted statement of a claim for relief, falls within the precise terms of the statute quoted above.

Aside from this specific exemption granted by Section 20 of the Clayton Act to the exact conduct charged to the defendants in this case, Section 6 of the Clayton Act and the Norris-LaGuardia Act also exempt from the Sherman Act this dispute arising out of the employer-employee relationship.

It is declared, in Section 6 of the Clayton Act:

> "The labor of a human being is not a commodity or article of commerce . . .". (15 U.S.C. § 17)

That this section exempts restraints regarding employee services from the operation of the Sherman Act has been expressly held by this Court in the *Apex Hosiery* case, wherein the Court said:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration of §6 of the Clayton Act, 15 U.S.C. §17, that '*the labor of a human being is not a commodity or article of commerce* . . . nor shall such [labor] organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the*

> *employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.''* (emphasis supplied)
>
> *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 502-503

That this principle laid down in the *Apex Hosiery* case is equally applicable to agreements of employers and employers' associations and to disputes between employers and an employee is clear from the language both of Section 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

In the report to the Senate of the Norris-LaGuardia Act, it was said:

> ''Moreover, it will be observed that this section (Section (6), as do most of all of the other prohibitive sections of the bill, *applies both to organizations of labor and organizations of capital.* The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.'' (emphasis supplied) (*Sen. Rep. No. 163, 72nd Cong., 1st Sess. 19*) (*1932*)

Subsections (a) and (c) of Section 13 of the Norris-LaGuardia Act (29 U.S.C. § 113, (a) and (c)) read as follows:

> ''(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employers; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) *between one or more employers or associations of employers and one or more employees or associations of employees;* (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between

one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested therein (as defined in this section).

* * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (emphasis supplied.)

This Court has held that the Sherman Act, Section 20 of the Clayton Act and the Norris-LaGuardia Act are three interlacing statutes which are to be read together. *United States* v. *Hutcheson*, 312 U.S. 219.

When the statutes are so read, it is clear that the Complaint alleges at most only a labor dispute within the definition of Section 13 of the Norris-LaGuardia Act and Section 20 of the Clayton Act and that accordingly the claim for relief attempted to be stated, is exempt from the Anti-trust Laws by the specific provisions of Section 20 of the Clayton Act.

CONCLUSION

Respondents have herein contended that:

1) The pattern of the organization and operation of professional football is identical with that of organized baseball and is not violative of the antitrust laws under the authority of the *Baseball* cases.

2) The radio-television aspects involved in the presentation of professional football do not constitute a basis for distinguishing the case at bar from the *Baseball* cases.

3) The "reserve clause" employed by professional football in and of itself is reasonable and not in contravention of the antitrust laws.

4) The cases of *International Boxing Club* and *Shubert* are clearly distinguishable and constitute no basis for a determination of the pending matter.

5) The complaint of petitioner is defective in failing to allege a causal connection between anything forbidden by the antitrust laws and the alleged injury of petitioner, if indeed any injury at all has been alleged.

6) The complaint fails to allege that anything done by respondents tended to restrict competitive conditions or cause the injury to the public which the anti-trust laws were intended to prevent.

7) The complaint alleges a labor dispute which is specifically exempted from the antitrust statutes by provisions of the Clayton and Norris-LaGuardia Acts.

Respondents respectfully urge that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

CLAYTON ACT:

Section 1.

"The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

29 U. S. C. § 53.

Section 6.

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

15 U. S. C. § 17.

Section 20.

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irrepar-

able injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

29 U. S. C. § 52.

NORRIS-LAGUARDIA ACT:

Section 13.

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade,

craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

* * * * * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

29 U. S. C. § 113(a)(c).